

TCEQ DOCKET NO. 2007-1019-IHW

2007 JUL 11 PM 4:50

IN THE MATTER OF THE REQUEST § BEFORE THE  
TO REMOVE WASTE MANIFESTED §  
AS HAZARDOUS WASTE ISSUED BY § TEXAS COMMISSION ON CHIEF CLERKS OFFICE  
THE EXECUTIVE DIRECTOR TO §  
PENSKE TRUCK LEASING CO., L.P. § ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S REQUEST FOR DENIAL OF CONSIDERATION OF  
TEXAS DISPOSAL SYSTEM LANDFILL INC.'S PETITION  
TO REVIEW THE EXECUTIVE DIRECTOR'S ACTION  
AND ORDER PROPER DISPOSAL OF HAZARDOUS WASTE

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL OF THE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), and files this Request for Denial of Consideration in the above-referenced matter. Notwithstanding the fact that Texas Disposal Systems Landfill, Inc. (TDSL or Petitioner) did not serve the Executive Director with a copy of its Petition to Review the Executive Director's Action and Order Proper Disposal of Hazardous Waste (Petition), the Executive Director would show the following:

I. No Commission Action is Warranted

While the ED recognizes and respects the Commission's plenary authority, both parties to the underlying dispute, TDSL and Penske Truck Leasing Co, L.P. (Penske), have lawsuits pending against the agency in Travis County District Court arising from the TCEQ's 2004 actions. However, in this context, the Commission does not have jurisdiction to reconsider the underlying 2004 events which are the basis for TDSL's Petition.

It is well settled that when a suit is brought to test the validity of an agency order, the agency loses jurisdiction over the subject matter of such order while the suit is pending. It is equally well settled that an agency has the right to reopen a matter and enter a different order upon a showing of changed circumstances; however, the agency does not have the authority to review a former order upon the same fact situation.

*South Texas Industrial Services, Inc. v. Texas Department of Water Resources*, 573 S.W. 2d 302, 304 (Tex. Civ. App. -- Austin 1978, writ ref'd n.r.e.). There is no recent change in circumstance or occurrence of any event which would support Commission consideration of the Petition filed by TDSL. Contrary to the Petitioner's portrayal of the

ED's inaction, the Petitioner has *refused* to allow compliance with the ED's September 24, 2004 directive to Penske and has instead elected to challenge the ED's enforcement action in multiple venues as described below.

## II. 2004 Review by the Texas Commission on Environmental Quality

The Commission has fully considered the ED's response to the underlying event that occurred almost a decade ago. On September 16, 2004, in response to TDSL's Motion to Overturn (MTO), the Commission overturned the Executive Director's approval to dispose of comingled picture tube waste as municipal solid waste special waste and remanded the matter to the ED with no additional direction. The ED issued a letter to Penske on September 24, 2004 providing two options for compliance: (1) dispose of the waste in the 99 roll-off containers as hazardous waste or, (2) alternatively, pursue the actions discussed at the September 16, 2004 agenda meeting. In the latter instance, the ED specifically required Penske to ensure compliance with all Resource Conservation and Recovery Act (RCRA) requirements. TDSL subsequently filed another Motion to Overturn the ED's September 24, 2004 exercise of enforcement authority. At a hearing on December 1, 2004, the Commission did not revise its prior order thereby leaving in place the ED's directive. TDSL challenged this action in Travis County District Court where it is still pending.

## III. 2006 Review by the Environmental Protection Agency

The Environmental Protection Agency (EPA), the federal agency whose regulations and expertise are integral to the outcome of this matter, has also reviewed the agency's actions. On May 17, 2006, in response to TDSL's Petition for Withdrawal of Approval of the Hazardous Waste Program of the State of Texas, EPA determined that cause did not exist to commence a withdrawal proceeding under applicable federal regulations. In its analysis of TDSL's petition, EPA confirmed that the ED's interpretation of federal RCRA regulations was consistent with EPA's interpretation. TDSL subsequently appealed this determination in the District of Columbia (D.C.) and 5<sup>th</sup> Circuit Courts of Appeal. On September 18, 2006, TDSL and the United States Department of Justice (DOJ)/EPA filed a Joint Motion to Stay Proceedings to allow the parties to explore whether TDSL's appeal could be resolved without litigation. On April 30, 2007, after negotiations failed and the stay was lifted, the DOJ filed a Motion to Dismiss TDSL's Petition for Review. The motion has not yet been set for consideration and accordingly remains pending in the D.C. Circuit Court of Appeal.

## IV. 2005 and 2007 Review by the Texas Legislature

Additionally, the Texas Legislature has reviewed this matter on several occasions. During the 79<sup>th</sup> Regular Session, the Senate Natural Resources Committee held a hearing at which the Commissioners appeared and testified. The Senate Natural Resources Chairman then directed his Chief of Staff to commence informal mediation with the parties which occurred on four occasions. At that time the ED, in an abundance of caution, offered that the TCEQ would remove the waste, manifest it as hazardous waste and dispose of it at a hazardous waste facility consistent with the relief requested by the

Petitioner; however, TDSL declined the offer. More recently, the Texas House of Representatives debated the matter on the House Floor during the 80<sup>th</sup> Legislative Session. The Chairman of the Environmental Regulations Committee made persuasive and compelling arguments, to which his counterparts agreed in the form of a record vote, that this matter should be heard in court.<sup>1</sup>

#### V. Pending District Court Review

At this point, TDSL has exhausted its administrative remedies in both the state and federal arena and now seeks another opportunity for an outcome favorable to its position in the form of this Petition which is in essence another Motion to Overturn the ED's September 24, 2004 directive. Assuming *arguendo* that 30 Texas Administrative Code (TAC) §80.272 applies in this context, TDSL's administrative remedy for the December 1, 2004 hearing would have been a Motion for Rehearing, which is required to be filed within 20 days after the date the party or his attorney of record is notified of the decision or order.<sup>2</sup> TDSL's Petition was filed with the agency on June 21, 2007, well over two years after the December 1, 2004 agenda meeting.

If the Petitioner desires to continue to challenge the ED's position, it should proceed with its pending lawsuits, namely, the private litigation in Hays County District Court and/or the administrative appeal in Travis County District Court.<sup>3</sup> All parties are represented by competent counsel although TDSL now ironically argues in its Petition that the Commission should not wait for a decision by a "generalist" judge as "the interpretation and enforcement of the complex specialized hazardous waste regulations at issue in the matter are not issues that the courts can be expected to resolve." If this is the Petitioner's position, it is unclear why litigation was initiated by the Petitioner in the first place. The courts are fully capable of performing their constitutional function, including review of agency decisions involving complicated and technical environmental issues. To suggest otherwise is absurd. The Texas Constitution vests the judicial power of the state in the courts. Tex. Const. art. V, § 1. The core of judicial power embraces the power to: 1) hear evidence; 2) decide the issues of fact raised by the pleadings; 3) decide questions of law; 4) enter a final judgment on the facts and law; and 5) execute the final judgment. *Black v. Dallas County Bail Bond Board*, 882 S.W. 2d 434, 438 (Tex. App. – Dallas 1994, no writ). Moreover, while TDSL argues to the contrary, it has become abundantly clear that Petitioner's concern with the outcome of the waste currently stored at TDSL's facility is not based on environmental risk but rather the Hays County District

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<sup>1</sup> Debate on House Bill 3581 on the Floor of the House, 80<sup>th</sup> Leg., R.S. (May 25, 2007) (Record Vote 1843, House Journal Page 6249)

<sup>2</sup> The Office of the General Counsel's November 17, 2004 letter notifying the parties of its December 1, 2004 agenda setting of TDSL's MTO "assum[ed], without admitting, that the Commission retains jurisdiction over the ED's September 24<sup>th</sup> letter."

<sup>3</sup> As noted in Protestant Texas Justice for All's (TJFA) Motion for Reconsideration of Order #4, *In re the Application of Waste Management of Texas Inc. for TCEQ Permit MSW-66B*, "counsel for TJFA has come to learn that Mr. Bobby Gregory, the primary person who acts on behalf of TJFA, will be a key witness in the trial of a case styled Cause 98-0159; *Texas Disposal Systems Landfill, Inc. vs. Penske Truck Leasing Co., L.P. et al*; pending in the 207<sup>th</sup> Judicial District Court of Hays County, Texas, which will be commencing October 15, 2007. It was only recently on June 18, 2007, at a status hearing, that this matter was set for trial for mid October, 2007. Previously, the trial date had been scheduled for July 9, 2007."

Court Judge's interpretation of RCRA regulations and resulting decision with respect to alleged tort damages. Thus TCEQ finds itself in an untenable position caused by the Petitioner's flagrant disregard for the legal process.

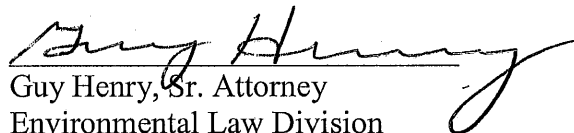
VI. Office of the General Counsel's June 28, 2007 Briefing Schedule

The Executive Director is unable to file a comprehensive briefing in this matter in the unprecedented timeline set out in the letter from the General Counsel. As noted, the Executive Director was not served on June 21, 2007, when the Petition was filed with the TCEQ Chief Clerk and served on other parties. The letter from the General Counsel on June 28, 2007, which states that a complete copy of the Petition may be obtained from the Office of the Chief Clerk, provided only eight working days before briefing was due. This expedited schedule is highly abnormal and not warranted for the reasons discussed above.

The Executive Director's staff who are indispensable to forming a complete briefing, are currently focused on implementation of legislation that takes immediate effect. Given the agency's legislative implementation priority, summer schedule, and lack of urgency in this matter, **the ED is requesting an additional 90 to 180 days for all parties to file briefs should the Commission or General Counsel elect to proceed with its request for briefs.** This additional time can be used by the ED staff to ensure the timely implementation of legislation, including those bills with an expedited rulemaking schedule.

If the Commission or General Counsel denies an extension of the briefing schedule, the ED will be unable to file additional briefing in this matter but would respectfully request the opportunity to speak to the issues at hand in the event this matter is set for Commission consideration.

Respectfully submitted,



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REPRESENTING THE  
EXECUTIVE DIRECTOR  
OF THE TEXAS COMMISSION  
ON ENVIRONMENTAL QUALITY

**Certificate of Service**

I hereby certify that on this the 11th day of July 2007, a true and correct copy of the Executive Director's Request for Denial of Consideration was sent by first-class mail, agency mail, electronic transmission, or facsimile to the following:

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**Certificate of Service**  
**Continued**

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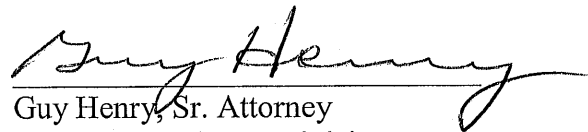
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